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Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AN *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
KENNETH W. GREENAWALT,
Counsel.

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THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AN *AMICUS CURIAE*

Preliminary Statement

This brief is filed by consent of the parties.

The American Civil Liberties Union is a non-profit, non-partisan organization of nation-wide membership devoted to protecting and upholding the fundamental freedoms guaranteed to all United States citizens by the Federal and State Constitutions. It regards as most vital the personal freedoms assured in the First Amendment of the Federal Constitution. It is interested in this case because it involves an important and novel aspect of one of those freedoms—the freedom of the press.

The problem presented here concerns the judicial censorship and suppression of a serious work of literature, by

the construction and application of a broad state obscenity statute, in relation to the First and Fourteenth Amendments which protect the freedoms of speech and press from abridgment by the States as well as by Congress. What standard should be set up and applied in the construction of such a State statute in respect of such a literary product? What should be the applicable tests and determining criteria in this class of case? Should not the "clear and present danger" test, as stated and applied so often by this Court in cases involving rights under the First Amendment, be applicable to this type of case? What "substantial evil" was this statute designed to protect? How clear, serious, actual and impending is the "danger", if any?

We shall limit ourselves to a discussion of the constitutional questions inherent in the situation presented by the record and proceedings in this case.

Statement of the Case

Appellant was convicted, on two separate informations, of the crimes of publishing and of selling a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County" by Edmund Wilson, in violation of Section 1141, subdivision (1) of the New York Penal Law. (Laws of 1909, Ch. 88 as amd. by L. 1941, Ch. 25.) It was fined $500 on each count and admonished that a future publication or sale would result in a prison sentence.

The defendant was found guilty by two of three Justices of Court of Special Sessions, City and County of New York, before whom the case was tried, without a jury. The dissenting Justice wrote an unreported opinion. The

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majority wrote none. Neither of two New York appellate courts, in affirming the conviction, wrote an opinion (272 App. Div. 799; 297 N. Y. 687).

The statute under which appellant was convicted provides in part:

> "§1141. **Obscene prints and articles.**
>
> 1. A person who sells, lends, gives away, distributes or shows, or offers to sell, lend, give away, distribute, or show, or has in his possession with intent to sell, lend, distribute or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; * * * or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, * * *.
>
> Is guilty of a misdemeanor, * * *."

This section of the statute is derived from Penal Code, Sec. 317, Laws 1881, c. 676, as amended by Laws 1884, c. 380, Sec. 1; Laws 1887, c. 692, Sec. 1; Laws 1900, c. 731, Sec. 1; Laws 1941, c. 925, Sec. 1.

The condemned book, "Memoirs of Hecate County", consists of a series of six interrelated chronicles about a group of suburbanites, typical of that "lost generation"—the American middle class between wars. It describes the adventures of a damned soul among his bedeviled contemporaries. It is a satirical work which portrays and characterizes realistically, sternly and critically the

quality of modern culture and civilization in several literary groups—the way people act, feel, think. The figure of the devil appears throughout the book in various manifestations, as a functioning character, representing the forces of egotism, pride, vulgarity and surrender of moral integrity. Throughout the book runs a common theme—a theme of the corrupting influences pervading the present generation and culture. The theme is very moral. Its apparent intent is to induce in the reader a sense of disgust with all he is likely to find around him in his life.

The book is a serious work of literature. It received favorable reviews from leading literary periodicals and critics. For instance, Time Magazine described it as "the best contemporary chronicle, so far, of its place and period", and "The first event of the year which can be described as literary".

The author has had a distinguished career as editor, writer and critic. He is said to be the best known American literary critic in this country and abroad. In literary circles, both academic and public, his reputation is of the highest. His prior works have been used in college literature courses.

The defendant is an old, well-known, highly reputable publisher and retailer of books. It distributed and sold this book openly, widely, publicly and by advertisement.

The prosecutor's attack was directed to only one of the six stories "The Princess with the Golden Hair" and to specific passages therein. This is an adroitly told story of two contrasting amatory adventures of an educated, unmarried, male, dilettante.

The State's evidence consisted solely of the book and proof, by defendant's concessions and by an agent of the

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Society for the Suppression of Vice, that defendant published and openly sold the book at its Fifth Avenue Store. No evidence was given or offered of any danger that a substantial evil would result from this book.

The constitutional question was duly and repeatedly raised, but ignored.

POINT I

The clear and present danger test should be the appropriate criteria in determining the constitutionality under the First Amendment of the suppression of works of literature by State Courts in construing and applying such a criminal obscenity statute.

The freedoms of speech and of the press are protected by the due process clause of the Fourteenth Amendment from impairment by State action (*Winters* v. *New York,* 333 U. S. 507, 509 (1948); *Gitlow* v. *New York,* 268 U. S. 652, 666 (1925); *Pennekamp* v. *Florida,* 328 U. S. 331, 335 (1945); *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940)).

State power in the field of this case has not been tested heretofore in this Court because not until 1925 in the *Gitlow* case, *supra,* was it recognized that, under the Fourteenth Amendment, the States must conform to the same standards of freedom of expression as, under the First Amendment, are applicable to the Federal Government and because no case involving the construction and application of a state obscenity statute in relation to a literary work has come before this Court. (*Winters v. New York, supra,* involved a cheap and sensationally illustrated detective magazine condemned by New York, not as obscene,

but as violating subdivision 2 of Section 1141 of the Penal Law relating to publications massing crime news.) That the exercise of such State power has not for long years or ever been tested in this Court, does not give sanctity to prior untested violations by the States (*Bridges* v. *California,* 314 U. S. 252, 267-8 (1941) and *Winters* v. *New York, supra,* at pp. 511, 520).

The constitutional limits of free expression in the Nation do not, or should not, vary with State lines (*Pennekamp* v. *Florida, supra,* at p. 335; *Bridges* v. *California, supra,* at p. 260). The right is a national right, federally guaranteed and available for exercise to all citizens of the Republic (*Thomas* v. *Collins,* 323 U. S. 516, 543 (1944)).

In recent years this Court frequently has expressed itself as to the nature, wide scope and vital importance of these liberties.

It has characterized the freedoms of speech and of the press as fundamental personal rights and principles; and has stressed the great importance of protecting the enjoyment of these essential liberties from every sort of restriction or infringement (*Schneider* v. *State,* 308 U. S. 147, 161 (1939); *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1937) and cases therein cited). Recently Mr. Justice Murphy wrote that "a free press lies at the heart of our democracy and its preservation is essential to the survival of liberty" and "any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth" (*Craig* v. *Harney,* 331 U. S. 367, 383 (1947)).

The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion (*Lovell* v. *Griffin, supra,* at p. 452). The rights of free speech and free press are not confined to "any

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field of human interest" (*Thomas* v. *Collins, supra,* at p. 531).

This Court twice recently has quoted with approval an historic statement that the importance of freedom of the press consists in the advancement of truth, science, morality and arts in general (*Thornhill* v. *Alabama, supra,* at p. 102; *Near* v. *Minnesota,* 283 U. S. 697, 717 (1930)); and, in reference to the postal laws, it has observed that the policy of Congress has been to encourage the distribution of periodicals devoted to literature, the sciences, arts, or some special industry because it was thought "those publications as a class contributed to the public good" (*Hannegan* v. *Esquire,* 327 U. S. 146, 154 (1946)). Literature is a recognized art.

The constitutional protection for a free press does not apply merely to the exposition of ideas. It applies to works of fiction. It covers publications which inform as well as those which entertain and the most valuable as well as the least valuable literature. It covers distribution as well as publication (*Winters* v. *New York, supra,* at p. 510).

This Court has said that freedom of discussion (press and speech) of the "problems of society" is a cardinal principle of Americanism (*Pennekamp* v. *Florida, supra,* p. 8); embraces, at least, the liberty to discuss publicly and truthfully "all matters of public concern" without previous restraint or fear of subsequent punishment; and, if it would fulfill its historic function in this nation, must embrace "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (*Thornhill* v. *Alabama, supra,* at pp. 101-2).

No limitation is expressed in the First Amendment in respect of the scope of the freedom of speech and press. It contains no restrictions as to type of publication, utterance or expression or as to the nature of subject matter.

The First Amendment does not speak equivocally. It prohibits any law abridging the freedom of speech or of the press. It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow (*Bridges* v. *California, supra,* at pp. 263-265).

Before the Constitution was adopted there had been several instances of judicial censorship of literature as obscene under the English common law. Originally, and also at that time, this was regarded as an offense against religion, triable, at first, in ecclesiastical courts and, later, in common-law courts (*The Queen* v. *Read,* 11 Mod. 205 (Q.B. 1708); *Dominus Rex* v. *Curl,* 2 Strange 789 (K.B. 1727); *Rex* v. *Wilkes,* 4 Burr. 2527 (K.B. 1770); See also Alpert "Judicial Censorship of Obscene Literature", 52 Har. Law Rev. 40, 44 (1938)). The English common law did not become part of our Constitution, particularly as to free speech and press, as was suggested earlier in *Robertson* v. *Baldwin,* 165 U. S. 275, 281. Rather, one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. The Constitution was ratified while the memory of oppressive English restrictions on the enumerated liberties was still fresh; and the First Amendment cannot reasonably be taken as approving prevalent English practices (*Bridges* v. *California, supra,* at pp. 264-5).

This Court has said that the rights of free speech and press are not absolute and that a State in exercise of its police power may punish abuses thereof. The "police power" is usually described as "the authority of the State

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to enact laws to promote the health, safety, morals and general welfare of its people". (See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571 (1941) and *Near* v. *Minnesota, supra,* at p. 707 and cases there cited). The Court has also suggested, in dicta supported by meagre authority, that speech and publications are subject to control if lewd, indecent, obscene or profane (*Chaplinsky* v. *New Hampshire, supra,* at p. 572; *Near* v. *Minnesota, supra,* at p. 706; *Winters* v. *New York, supra,* at p. 510). The *Chaplinsky* case had reference to words uttered orally on a public street and inciting an immediate breach of peace.

At the same time the Court has pointed out that the limitation upon individual liberty by a State in exercise of that power must find its justification in a reasonable apprehension of danger to organized government and must have appropriate relation to the safety of the State, otherwise it violates the constitutional principle (*Herndon* v. *Lowry,* 301 U. S. 242, 258 (1937)); and that the limits of this police power must always be determined with appropriate regard to the particular subject of its exercise (*Near* v. *Minnesota, supra,* at p. 707). It has also noted and warned that historically, most infringements of personal liberty have been justified in the name of righteousness and the public good (*Minersville District* v. *Gobitis,* 310 U. S. 586, 604-5 (1940), Stone, J., dissenting; as overruled 319 U. S. 624, 637).

The Court has stated that the safeguarding of these rights to the end that men may speak as they think "on matters vital to them" and that falsehoods may be exposed through the processes of education and discussion is essential to free government; that noxious doctrines may be refuted and their evil averted by the courageous exercise of free discussion; and that abridgment of free

speech and press impairs the opportunities for public education essential to the effective exercise of popular government (*Thornhill* v. *Alabama, supra,* at pp. 88, 95; *Whitney* v. *California,* 274 U. S. 357, 372). It has cited, with approval, Madison's remarks that while some degree of abuse is inseparable from the proper use of everything, including the press, it was in the minds of the founding fathers "that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away to injure the bigger of those yielding the proper fruits" (*Near* v. *Minnesota, supra,* at pp. 717-18).

In *Thomas* v. *Collins, supra,* at pp. 545-6, Mr. Justice Jackson, concurring, stated:

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. • • • These [speech and press] are thereby left great range of freedom.
>
> "This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate or useful to society."

The judgment in the first instance is for the legislative body. But mere legislative preferences or beliefs are not enough in civil rights cases. Where abridgment of these rights is asserted the delicate and difficult task falls upon the courts—and upon this Court independently—to weigh the circumstances and to appraise the substantiality of the

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reasons advanced in support of the regulation of the free enjoyment of the rights, to the end that there be no intrusion upon this domain unless grave and impending public danger requires this (See *United States* v. *C.I.O.*, 335 U. S. 106, 139-140 (1948) and the *Thomas, Schneider, Thornhill, Bridges* and *Craig* cases, *supra*).

Where the State's power begins and where the individual's freedom ends is the line that always must be drawn. It is a delicate choice, particularly where the presumption supporting legislation is balanced by the preferred place given to these freedoms, but there is no room for "doubtful intrusions". It is the character of the right, not the limitation, which determines what standard governs the choice; and the presumption of constitutionality that is accorded to other legislation is refused to statutes affecting civil liberties (*Thomas* v. *Collins, supra,* at pp. 529-30; *United States* v. *C.I.O., supra,* at p. 140).

It was to aid in that choice and to find a practical workable test that the "clear and present danger" rule has been formulated and adopted by this Court.

Mr. Justice Rutledge continuing in *Thomas* v. *Collins, supra,* says at p. 530:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only

> the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction. * * *."

That rule, as originally stated in *Schenck* v. *United States,* 249 U. S. 47, 52 (1919), has afforded a practical guidance and has been applied and restated by this Court in a large number and variety of cases in which the scope of the constitutional protections of the freedom of expression was in issue in relation to State statutes or acts effected under the police power (*Bridges* v. *California, supra,* at p. 262).

A fair summation of the rule was given in the *Bridges* case at pp. 262-3:

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', * * * it must be serious' * * *."
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here."

The danger must not be remote or even probable; it must immediately imperil; the utterances, undoubtedly, must be a serious and immediate threat. The clear and present danger test "is fashioned to serve the needs of all litigation, not merely selected types of pending cases" (*Craig* v. *Harney, supra,* at pp. 376, 378).

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From the foregoing principles it seems apparent that the clear and present danger test is applicable in the instant type of case.

The case involves a limitation of the constitutional freedom of expression (press) under a criminal obscene statute as construed and applied by State courts. The statute does not state the purpose or reasons for its enactment, define its terms or set forth tests to be applied in construing it. Presumably its enactment was originally justified in the 1880's as an exercise of some phase of police power. The New York courts have not interpreted the statute in relation to this book and have not stated the reasons for suppressing it or the test they applied in condemning it or the respects in which they considered it obscene. Since the attack of the prosecutor was concentrated solely on "The Princess with the Golden Hair", it may be assumed that the courts objected to the discussion therein of the sex thoughts, life and activities of the male character narrating the chronicle.

The First Amendment does not exclude from its protection discussions of sex life or conduct or books dealing with or delineating the morals and manners of the times. It does not condemn expressions which may be "beyond the conventions of the day". Sex and sex behavior certainly is a "field of human interest" and a matter "vital to men". Today, as never before, sex behavoir problems are "problems of society" and are issues about which information is needed to enable today's members of society to cope with the exigencies of their period. Today sex is not even an "unconventional" subject. (Cf. *Thomas, Thornhill, Pennekamp* and *Hannegan* cases, *supra*).

Lippman in his "A Preface to Morals", pp. 285, 300, speaks of "man's immense preoccupation with sex" and of the "immense and urgent discussion of sex throughout the modern world".

The recent report of *Kinsey, et al.* on "Sexual Behavior in the Human Male", which is based on thousands of case histories and for many months has been a leading "best seller", confirms Lippman's observation and shows conclusively that the sex life and conduct described in this book is not uncommon in this country. There is every indication that the picture painted by this author is a truthful portrayal of the sex morals, manners and thinking of at least one segment of our society and culture. Our present culture is characterized by a revealing frankness and realism in respect of artistic expressions, in painting, sculpturing, literature, plays, movies, advertising, attire and so on.

In recent years the market has been flooded with books and other publications devoted to a frank discussion of sex, sex behavior and sex problems from the point of view of biology, psychology, sociology, anthropology, education, psychiatry, birth control, marital relations, sex instruction and techniques, etcetera. Historical novels candidly portraying human sex conduct in other periods have long been best sellers. Many books have been published dealing in specific detail with the sex life of primitives and savages and of insects, birds, fish and animals. The subject of sex no longer is regarded as taboo, secret, pagan.

For some time nudes have been painted without veils and sculptured without fig leaves and both have been freely displayed and illustrated in books and catalogues (See articles and plates on "Sculpture", "Sculpture Technique" and "Painting", *Encyclopedia Brittanica,* Vols. 17, 20). Examples of what might be

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regarded by some as highly provocative statues are the nude female torsos by Archipenko, Maillol, Epstein and LaChase; and, particularly, Rodin's "L'Eternal Printemps" and "The Kiss" and Maillol's "Desire", each of which shows a nude couple in an intimate and suggestive embrace. (See also many authorities cited in *Palmelee* v. *U. S.*, 113 Fed. 2nd 729 (1940)).

It is extremely difficult to believe that a non-illustrated work of literature, such as the one here, would be as provocative of evil thoughts or acts as current expressions and stimuli in other fields or that such a book would materially accentuate the normal thoughts, desires and impulses inherent in the human mind and body as a result of normal sex instincts. (Cf. Alpert *"Judicial Censorship of Obscene Literature", supra,* at pp. 73-4, *supra,* where the author presents the opinion backed by statistics that books are not a material factor in causing sexual stimulation in relation to other stimulating factors existing in our contemporary civilization).

Under the clear and present danger rule, New York was required to show the sale and production of this book created a danger, (clear, present and immediate and not just likely, possible, probable or remote) of bringing about a substantial, extremely serious evil that the State of New York had a right to prevent—whether that evil be a corruption of public morals or an injury to public order or something else. That was the test required by the above authorities.

Even if it had been shown or found that the book had an inherent or reasonable tendency or mere likelihood to cause such a result, that would not be enough of a showing to justify a restriction of free expression. (*Herndon* and *Bridges* cases, *supra.*)

POINT II

The history of judicial censorship of literature as obscene, especially in New York, and the nature of the rights and of the penalty involved here, show the compelling necessity of an ascertainable standard of conduct and a proper test.

In this type of case the need of an ascertainable standard as to the kind of conduct prohibited is particularly compelling. Violation of the New York obscenity statute is a misdemeanor punishable by a fine of from $50 to $1,000 or imprisonment for ten days to one year, or both, for each offense (Sec. 1141 (3) Penal Law, *supra*).

Aside from the statutory penalties, when a book is suppressed there results a serious loss of money and property to the publisher and of the fruits of long intellectual labor to the author. If the book has any literary merit or substance, such a suppression also results in a real loss to the reading public and to society. Merely the fear and threat of criminal prosecution and punishment and resulting loss of property is an inherent form of censorship and stifles creative effort in literature (Cf. *Thornhill* case, *supra*, at pp. 97-8).

The standards of certainty in statutes punishable for offenses is higher than in those which depend on civil sanction for enforcement. The crime must be defined with appropriate definiteness. There must be ascertainable standards of guilt as to the meaning and scope of the statute and in regard to the applicable tests to ascertain guilt (*Winters* v. *New York*, *supra*, at pp. 515-516 and cases there cited; *Herndon* v. *Lowry*, *supra*, at pp. 261-4).

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Such a statute, as construed and applied to a particular defendant, must furnish a sufficiently ascertainable standard of guilt and where it fails to do so, the law necessarily violates the constitutional right (*Herndon* v. *Lowry, supra,* at p. 264).

When acts are to be made penal and are to be visited with loss or impairment of life, liberty or property, political liberty under constitutional guarantees requires clear and exact definition of the offense (*People* v. *Wallace & Co.,* 282 N. Y. 417, 419; *Pound,* 21 Harv. Law Rev. 383, 387).

The standard of definiteness for legislation involving civil liberties is more stringent than that for other types of laws and there is no presumption of constitutionality as to such legislation (*Thomas* v. *Collins, supra,* at pp. 529-30; *United States* v. *C.I.O., supra,* at p. 140). A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished violates due process. There is a particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution, although the Court is dealing with an aspect of a free press in its relation to public morals (*Winters* v. *New York, supra,* at pp. 509, 510).

In light of criminal penalties for miscalculation the burden of determining whether or not a given utterance could constitutionally be proscribed is considered so heavy as to result in a restriction on that free dissemination of ideas which the First amendment protects. (61 Harv. Law Rev. 1208, 1210. *Thornhill* v. *Alabama, supra,* at p. 97.)

The New York obscenity statute is very broad. It does not define the words used therein. It lays down no

test for obscenity. Neither the trial court nor either of the appellate courts wrote an opinion stating the reasons for the suppression of this book, or the respects in which the book was deemed to have offended, or the test or tests which were applied to ascertain the defendant's guilt, or the claimed evil it would cause. Neither this author or publisher nor any other author or publisher has received any light from these courts as to what conduct or what particular words are unlawful and prohibited. No criteria for future conduct is furnished. Although the constitutional questions and the applicabilty of the clear and present danger test were duly raised, there is no indication that the New York courts applied that test or regarded it as relevant.

When the courts of a State deprive the reading public of a work of fiction by an eminent literary critic of the day, it seems incumbent upon them to state their reasons (47 Col. Law Rev. 686, 688 (1947)).

In *Winters* v. *New York, supra,* at page 518, the majority of this Court suggested (p. 518) that the words obscene, lewd, lascivious, filthy, indecent and disgusting are "well understood" through long use in the criminal law, thus permitting statutory uncertainty; but it further suggested (p. 514) that the construction and interpretation given such a statute by the State courts fixes its meaning and puts the interpretive words into the statute as definitely as if amended by the legislature. However, the minority Justices (p. 538) doubted the assumption that long use in criminal law gives assurance of clear meaning and expressed disbelief that the law reports permit one to say that statutes condemning obscenity are much more unequivocal guides to conduct than the statute furnishes.

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The decisions of the New York courts under this obscenity statute certainly do not reflect that the meaning of the statutory words is either clear or "well understood", but rather, reflect a maze of equivocation and confusion on the subject.

The Court of Appeals in that very case (*People* v. *Winters*, 294 N. Y. 545, 550, 551), after referring to the caption of Section 1141 "Obscene prints and articles", said:

> "Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice." • • •
>
> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times • • •."

One can hardly say that the "continuing and changing experience of the community" or the mere likelihood that some vaguely defined evil may result in some indefinite period of time furnishes any reasonably ascertainable guide to an author or publisher as to the permissible limits of free expression. It certainly can not be expected of such a person that he conduct a "Gallup poll" throughout the nation or the state on the subject of what type of books are likely at a given time to result in the evil suggested or some other undefined evil.

In his learned article on "Judicial Censorship of Obscene Literature" *supra*, at p. 64, Mr. Alpert, after

reviewing the decisions of the New York courts on the subject, states: "As must already be patent, however, the New York law is a very welter of dissonances"; and adds that the magistrates in New York City "have created their own tests for obscenity in literature".

In *People* v. *Seltzer*, 122 Misc. 329, 333 (1924), the court said that the subject had been left in a "confused state" because of the inconsistency of prior interpretations due in part at least to "the breadth of the section's scope."

In *People* v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936), Magistrate Perlman, who dissented here in reviewing the New York decisions, stated:

> "Opinions are bound to vary. This fact we must recognize. This difference is reflected in the decisions of our own courts. From what is the public to be protected? Who are to be protected? What test shall be applied? Shall we consider the opinion of literary critics? Are 'de-luxe' editions exempt from the provisions of our land? The answers to these questions are not in accord. Judges like all human beings vary in their views."

In *People* v. *Berg*, 241 App. Div. 543 (1934), aff'd 269 N. Y. 514 (1935), the Court observed that in the prior judicial opinions "no clear standard [is] given for determining obscenity and indecency" but therefrom "there does emerge somewhat hazily", the rule hereafter mentioned (*infra*, p. 22).

In *People* v. *Dial Press*, 182 Misc. 416 (1944), the Magistrate remarked that he had "plodded through the definitions in two dictionaries of the several words used" and had come to the conclusion "that each of these words is synonymous with the others". Although the People contended he could not do so, he resorted, in desperation, to the Federal rule, under a different type of statute, as stated

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in *United States* v. *One Book Entitled Ulysses*, 72 Fed. (2d) 705 (CCA 2nd 1934).

Very recently another Magistrate, confronted with the confusion of the prior judicial authorities, observed in *People* v. *London*, 63 N. Y. Supp. (2) 227 (1946):

> "The words used by the statute 'obscene, lewd, lascivious, filthy, indecent', are not self-defining. Nor are the dictionaries of much help in determining their precise meaning. • • •
>
> "We must turn for an authoritative interpretation of the meaning of the statutory language to the decisions of our courts. Unfortunately, these decisions do not furnish an infallible guide for determining when a book is obscene or indecent. A recent critic of the New York decisions on the suppression of obscene literature states that they are a 'very welter of dissonances.' • • • This is particularly true of Magistrates' Court decisions interpreting Section 1141 of the Penal Law. • • • Obviously, the test of obscenity and indecency used by Magistrate Keutgen [in *Dial Press* case, *supra*] is far more strict and would bar many more books than that used by Magistrate Greenspan [in *Viking Press* case, *infra*].
>
> "Similar differences of opinion may also be noted in the decisions of higher courts. • • • These tests of People *v.* Berg, however, have been qualified by many cases."

The attitudes and confusion of the judges in the lower criminal courts are extremely important in this class of case. They are the triers of the fact. There is the real battleground. The Court of Appeals in affirming a conviction said in *People* v. *Pesky*, 254 N. Y. 373:

> "This court is a court of review, restricted in cases of this order to a pronouncement of the law, and without power to act as a trier of the facts.

> If those charged with the duty to pass judgment upon the facts might say not unreasonably that the book sold by the defendant was obscene, lewd or indecent beyond a reasonable doubt (Penal Law, §1141), we are not at liberty to substitute our judgment for theirs, or to supersede their function as the spokesmen of the thought and sentiment of the community in applying to the book complained of the standard of propriety established by the statute."

That court, not infrequently, as here, has affirmed convictions without opinion (cf. *People* v. *Berg, supra* and *People* v. *Fellerman,* 269 N. Y. 514 and 629 (1936)).

Reference to the decisions themselves indicate the reason for the welter of vagueness, uncertainty and confusion that has grown up.

In several cases it is stated that the question is whether the tendency of the play or publication is to excite lustful and lecherous desire (*People* v. *Wendling,* 258 N. Y. 451, 453 (1932); *People* v. *Eastman,* 188 N. Y. 478, 480 (1907); *People* v. *Brainard,* 192 App. Div. 816, 820 (1920)).

Other cases have said that the test of an obscene book was that stated in *Regina* v. *Hicklin* (L. R. 3 Q. B. 360), i.e., whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such influences and who might come in contact with it (*People* v. *Muller,* 96 N. Y. 408, 411 (1884); *People* v. *Pesky, supra,* 230 App. Div. 200, 203, aff'd 254 N. Y. 373 (1930); *People* v. *Seltzer, supra,* at pp. 333, 335-6; *People* v. *Viking Press, Inc.,* 147 Misc. 813 (1933)).

In *People* v. *Berg, supra,* at pp. 544-545, the rule the Court said emerged "somewhat hazily" from the prior opinions was "that an obscene book is one that 'tends to corrupt the morals of youth', or 'to lower the standards

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of right and wrong specifically as to the sexual relation'. To be deemed obscene it must show 'sexual impurity' and result in 'the exciting of lustful and lecherous thoughts and desires' or tend 'to stir sex impulses or to lead to sexually impure thoughts'." Also, in referring to the unnamed book therein, that Court stated:

> "In addition it lacks literary merit. It teaches no lesson and points no moral. It describes no period of history and the people or characters of that time and their conduct and habits of life—such, for instance, as the 'Elizabethan Age;' and no folk lore or tales of primitive people living in isolated regions. We cannot believe that the story is one even possibly true or representative of any individual or of any limited class. In our opinion it is obscene, lewd, lascivious and disgusting, and nothing more; and was so intended to be for purely mercenary purposes."

(See also, *People* v. *London, supra,* at p. 230.)

In *People* v. *Brainard, supra,* the court refused to suppress as obscene a book about a prostitute though it found no useful purpose in the publication or that it had any moral lesson to teach.

In the *Wendling* case, *supra,* the Court said the play involved was vulgar, profane, indecent, but that "One may call a spade a spade without offending decency, although modesty may be shocked thereby".

In the *Seltzer* case, *supra,* the Court, after referring to the tests first above noted, added a further one to the effect that matter is obscene which is "so filthy and disgusting as to be revolting to those who may have occasion to read them".

In several cases it has been stated that it is no part of the duty of Courts to exercise a censorship over literary

productions (*People* v. *Wendling, supra; St. Hubert Guild* v. *Quinn*, 64 Misc. 336, 118 N. Y. Supp. 582 (1909); *People* v. *Pesky, supra*, dissenting opinion, 230 App. Div. 200, at p. 206; *People* v. *Miller*, 155 Misc. 446, 279 N. Y. Supp. 583 (1935); *People* v. *Gotham Book Mart, Inc., supra*, at p. 243).

In *Halsey* v. *N. Y. Society for the Suppression of Vice*, 234 N. Y. 1 (1922), the Court in holding that Gautier's novel "Mademoiselle de Maupin" was not obscene, though parts of it were vulgar and indecent, referred to the fact that it was the work of a great author written in admirable style which had become part of classical literature.

In *People* v. *Viking Press, Inc., supra*, at page 814, holding Erskine Caldwell's book "God's Little Acre" not obscene, the Court said:

> "The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts.
>
> "The courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manner just indicated, its effect would be to prevent altogether the realistic portrayal in literature of a large and important field of life. The Court of Appeals has consistently frowned upon such an interpretation of the statute. (*People* v. *Wendling*, 258 N. Y. 451; *Halsey* v. *N. Y. Society for the Suppression of Vice*, 234 id. 1.)"

In this case the Court pointed out the book was an attempt to portray, in a realistic fashion, life as lived by

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an illiterate Southern white farm family, the activities of which were "largely sexual"; that the book had literary merit and was a sincere attempt to present with truth and honesty a segment of life in the United States; that the author had set out to paint a "realistic picture" which necessarily contained "certain details"; and that because such details related to "the sex side of life, portrayed with brutal frankness" the Court could not say that the picture should not have been created at all. (Compare with here.)

However, in several cases it has been held that literary style, distinction of authorship and subtlety of thought are entitled to no consideration (*People* v. *Seltzer, supra,* at page 334; *People* v. *Freide,* 133 Misc. 611, 615 (1929)).

On the other hand, in *People* v. *Gotham Book Mart, Inc., supra,* at page 243, the Court, in referring to the *Viking Press* case, said that its holding that the statute is limited to works of pornography did not offer a real solution and was merely an attempt to escape from the "apparent confusion and inconsistency" in the New York cases.

In several cases it has been held that the purpose of the statute is to prohibit the exploitation of smut—dirt in the raw—dirt for dirt's sake (*People* v. *Miller, supra,* p. 447; *People* v. *Gotham Book Mart, Inc., supra,* p. 244; *People* v. *Berg, supra,* p. 545).

(Alpert, in his article, *supra,* at p. 40 fn., suggests that the line between literature and pornography is distinctive enough if certain tests stated there are applied. On all of those tests this book is clearly literature.)

In *People* v. *Fellerman, supra,* 243 App. Div. 64 (1934), aff'd 269 N. Y. 629 (1936), the test applied was "that it tends to lower the standards of right and wrong, that it offends against modesty and that it is subversive of morality".

In *People* v. *Dial Press, supra,* at page 417, obscenity was defined as "contrary to the moral law and tending to subvert respect for decency and morality." In *People* v. *Miller, supra,* it was said "the criterion of decency is fixed by the time, place, geography and all the elements that make for a constantly changing world".

In several cases the judges have followed the Federal test used in *United States* v. *One Book Entitled Ulysses, supra.* (See the *Dial Press* and *Gotham Book Mart, Inc.* cases, *supra.*) In the latter case the test announced was (at p. 244):

> "Whether or not, recognizing the latitude afforded all works of literature and of art, and that tastes may differ, a reasonable, cautious and prudent man environed with the conditions of life as they exist today, and not in some past age, would be justified in believing that the book was obscene and lewd not in certain passages, but in its main purpose and construction and published for no useful purpose, but simply from a desire to cater to the lowest and most sensual part of human nature? In applying these tests, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern; and the verdict of the past, if it is ancient, are persuasive pieces of evidence."

The decisions by the Court of Appeals and this Court in the *Winters* case, *supra,* have not lifted the fog of interpretations.

In *People* v. *Vanguard Press,* 192 Misc. 125 (May 12, 1947), referred to and applied each of the many different "prevailing standards" mentioned in the above cases but stated:

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"The standards to be applied have been variously defined, but, it is now generally held, involve a measure limited to the extent to which that effect would be sexually demoralizing (People *v.* Winters, 294 N. Y. 545 (1945))."

Apparently the latest statement in New York is found in *People* v. *Creative Age Press*, 192 Misc. 188, 190, 191 (May 19, 1948), where the decision of this Court in the *Winters* case was cited and this test given:

"To determine whether a book falls within the condemnation of the statute, an evaluation must be made of the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior. (See *People* v. *Berg*, 241 App. Div. 543, *supra*.) Various factors should be borne in mind when applying the judicially accepted standards used in measuring that effect. Among others, these factors include the theme of the book, the degree of sincerity of purpose evident in it, its literary worth, the channels used in its distribution, contemporary attitudes toward the literary treatment of sexual behavior and the types of readers (particularly with respect to age and intellectual development) reasonably to be expected to secure it for perusal."

After saying that he cannot find "by any prevailing judicial standard" that the book "would have a sexually demoralizing effect upon its readers, the judge continues:

"Nowhere does the book 'invite to vice or voluptuousness' (*People* v. *Wendling*, 258 N. Y. 451, 454, *supra*), nor would it tend 'to excite lustful and lecherous desires' (*People* v. *Eastman*, 188 N. Y. 478, 480). I find that this book is not obscene or otherwise within the condemnation of the statute."

Similar confusion exists in New York as to who is to be protected, whether it is "every person"; the "young and inexperienced"; "the young, immature, the ignorant and sensually minded"; "readers generally"; "its readers"; "normal and not abnormal people"; the "community"; the "public"; not the mature and intelligent; the normal readers both old and young (See *Fellerman, Pesky, Seltzer, Gotham, St. Hubert Guild, Vanguard Press* and *Creative Age* cases, *supra*).

An analysis of the various New York tests used up to 1938 will be found in Mr. Alpert's article *supra* at pp. 64-5. He concluded that the principal test in New York as announced by the higher courts was substantially the orthodox test based on the *Hicklin* doctrine—whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such moral influences and into whose hands the matter might fall.

That was the test urged in this case by the State (See People's Briefs below and memorandum herein, 297 N. Y. 687, 688). The courts did not indicate whether or not that test was applied here.

Manifestly, the obscenity statute, as it has been interpreted and applied by New York courts—and as it has applied but not been interpreted in this case—"blankets with uncertainty" whatever may be written (*Thomas* v. *Collins, supra,* at p. 535). Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long established constitutional principles surrounding their delimitation (*United States* v. *C.I.O., supra,* at p. 153, Rutledge, J.).

Even "conservative" Massachusetts has recognized that such a test as that suggested in *New York* v. *Winters,* 294

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N. Y. 545, 551, *supra,* makes the standard an uncertain one, shifting with every new judge or jury, and that such a standard must be rejected as unworkable if not unconstitutional, for it would in effect licence every judge or jury to create their own standard in each case. (*Commonwealth* v. *Isenstadt,* 318 Mass. 543, 550 (1945), banning the widely sold and discussed "Strange Fruit"). Such a statute "leaves open the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against". (*Herndon* v. *Lowry, supra,* at p. 263, quoting from *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81.)

That precisely is the situation in New York today.

This statute, as interpreted and applied by the New York courts is vague, broad and uncertain to an extreme and provides no ascertainable standard as to conduct or tests to determine guilt. It has not been narrowly drawn, or construed or applied by the courts, in accordance with the requirements of this Court in the "clear and present danger" rule cases. No one can foresee its scope or adequately guard against it. It amounts to a dragnet which may enmesh anyone who writes, especially in regard to sex (*Herndon* case, *supra,* at p. 263, *Thornhill* case, *supra,* at p. 96; *U. S.* v. *C.I.O., supra,* at pp. 141-2).

This Court has clearly indicated that "tendency", reasonable or inherent, or "mere likelihood" are not sufficient to justify a restriction of free expression (*Bridges* and *Herndon* cases, *supra*).

It is time for the application by the States of a new test in this type of case, a test that will be related to the First Amendment and will apply equally to New York, Massachusetts and every other state and to the Federal government. This is the clear and present danger test,

which has proved a practical guide in other types of civil liberties cases.

While the Federal Court cases (which arose under different types of statutes) beginning with the *Ulysses* decision, have overruled the rigorous, "tendency" doctrine of *Regina* v. *Hicklin* (LR 3 Q.B. 360) and have used other, enlightened tests they have had no occasion to consider or apply the question in relation to the First Amendment. (See *U. S.* v. *One Book Entitled Ulysses*, 72 Fed. 2nd 705 (C. C. A. 2nd, 1934); *U. S.* v. *Levine*, 83 Fed. 2nd 156 (C. C. A. 2nd, 1936); *Palmelee* v. *U. S.*, 113 Fed. 2nd 729 (C. C. A. Dist. Cal., 1940); cf. *Swearingen* v *U. S.*, 161 U. S. 446, 451 (1896); *Rosen* v. *U. S.*, 161 U. S. 29, 43 (1896)). In Massachusetts a rigorous, "substantial tendency" test is still being applied, though the Massachusetts obscenity statute recently has been liberalized in some respects. (See Laws of Mass., chap. 278, Acts of 1945, Secs. 28A-H; *Commonwealth* v. *Isenstadt*, *supra*).

These are the jurisdictions in this country where most, if not all, of the obscene literature cases have arisen, possibly because of the private censor organizations operating therein or because the largest publication houses are located there and the censor's real desire is to suppress at the source and regulate the reading habits and morals of the whole nation (Alpert, *supra*, at p. 53). It may be doubted that these states (or New York City and Boston where the suppression generally occurs, at the instance of a private censorship group) are the moral citadels of America or have "public morals" superior to that prevailing in other states where censorship of literature is practically unknown.

In the *Isenstadt* case, *supra*, at p. 558, incidentally, the Massachusetts Supreme Court specifically rejected the

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"clear and present doctrine", but thought, if it applies to such cases "danger of corruption of the public mind would be sufficient danger to satisfy".

The standard in New York has been and still is an uncertain one, in effect shifting with every new judge or bench.

On the basis of these tests how can any author or publisher know where are the permissible limits of free expression or guard against punishment?

How would such classics as "The Song of Solomon" and other books of the Bible, Shakespeare's "Venus and Adonis" and "Anthony and Cleopatra", Voltaire's "Candide", Ovid's "Art of Love" (to take a few examples) pass the test either when written or now? How could their authors have been advised so as to avoid censorship and criminal punishment?

Should authors and publishers today be compelled to be put to the risk and peril that some judge will find their work has a "tendency" or "likelihood" to cause some evil which the legislature has not specified but which the courts varyingly refer to in vague terms in each new opinion or that some reader will be caused thereby to have some added stirring of desire or "impurity" of thought. Only a master, if any, could walk the perilous wire strung by the criteria of this statute as interpreted by the New York Courts (*U. S.* v. *C.I.O., supra,* at p. 153, Rutledge, J.).

What evil exactly was the statute intended to prevent? Is it related to possible criminal acts or breaches of the peace or to mental and emotional reactions the true source of which no one can be sure and the effect of which is not apparent? Is it substantial and extremely serious? Did New York have a right to prevent that evil as an exercise of the police power as against the guarantees in the First

Amendment? Did the publication and sale of the book create or threaten any danger that such evils would result? And, if so, was that danger clear, present, immediate rather than remote, probable, doubtful or possible?

These are the tests which New York should have considered and applied in this case, and did not.

POINT III

It is a matter of paramount public importance that freedom of artistic and literary expression be not confined, at least not short of the furthermost constitutional boundaries of protected expression.

There is no more vital freedom in a democracy than the freedom of expression. It is a national right, federally guaranteed. It transcends State lines.

The Federal Constitution was established by all of the people of the land "to promote the general welfare" and to secure the blessings of liberty to posterity (Preamble). It could not have been adopted without the promised inclusion of the Bill of Rights. The First Amendment is in promotion of the "general welfare" of the entire country. It transcends any local public welfare of States. The superior rights of all United States citizens should not be curtailed on the theory that some State regards it necessary for its local public welfare.

The field of literature and artistic expression is not confined to any country, state or locality. It is impervious to State lines. Persons of literary ability and genius may spring from any place or strata of society in any period of time. More frequently than not, their lives have been marked by struggle, hardship and poverty.

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The business of publishing, distributing and selling books is nation-wide, if not world-wide. The great publishing houses in New York and Massachusetts do not publish books merely for the benefit of citizens of those States, but for citizens of every state and nation.

History has shown that society is too greatly indebted to creators of literature to suppress their genius by statute or by judicial decree or otherwise. The classic in literature usually is not recognized as such when it first appears or for a long time thereafter. History also shows that many of our classics in literature were at first greeted with scorn, disapproval and proscription, because expressions therein went beyond the conventions of the day.

The lessons of history in these fields should not be easily forgotten. A few examples will suffice. Hugo's books, including "Les Miserables", were claimed to be immoral and were placed on the index librorum prohibitorum. Voltaire's works were condemned and his life and liberty were in frequent jeopardy as a result of his writings; yet a recognized authority has said that he did "more to destroy the greatest of human curses than any other of the sons of men" (*Lecky's* "Rationalism in Europe", Vol. II, p. 71; see also *St. Hubert Guild* v. *Quinn, supra,* at pp. 341-2, in which a New York Court, as late as 1909, was asked to find Voltaire's "The Philosophical Dictionary" immoral and obscene and in which the Court stated "the last time it was judicially condemned • • • was in France in 1766, when it was publicly burned in the streets of Paris").

Lord Eldon's foolish judgments proscribing Southey's "Wat Tyler" and Byron's "Cain" and the finding of a jury under a charge by Lord Denman that the publication of Shelley's "Queen Mab" was an indictable offense,

should be a warning today to all who have to determine the limits of the field within which authors may exercise themselves (see *Southey* v. *Sherwood*, 2 Meriv. 437; 6 Petersdorff Abr. 558, 559; *Maxon's* case, 2 Mod. St. Tr. 356 and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 157, fn. 19 and *United States* v. *One Book Entitled Ulysses, supra*, at p. 708).

The most famous case of literary censorship was the proceedings brought against Flaubert for his writing of "Madame Bovary". *Strachey* in "Landmarks in French Literature", at page 235, calls Flaubert "the greatest prose writer of the age * * *. There has never been a writer who took his art with such a passionate seriousness, who struggled so incessantly toward perfection, and who suffered so acutely from the difficulties, the disappointments, the desperate, furious efforts of an unremitting toil." And at page 238 he says:

> "Madame Bovary gives us a picture of life in a French provincial town in the middle of the last century—a picture which, with its unemphatic tones, its strong sensitive, and accurate drawing, its masterly design, produces an effect of absolutely convincing veracity. The character and fate of the wretched woman who forms the central figure of the story come upon us, amid the grim tepidity of their surroundings with extraordinary force."

But in the letters Flaubert wrote at the time the authorities attempted to suppress this book, the effect upon the author and his subsequent writings is apparent.

In Vol. 3 of "Correspondance" (G. Charpentier et Cie. 1887) at page 72 (letter to Mme. Maurice Schlesinger 14 Jan. 1857) he spoke of the danger he ran not only of a year in prison and a fine of 1,000 francs but also that

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every new volume of his would be scrutinized and picked at by the police so that it would be impossible for him to print a line. The social hypocrisy, he complained, was stupid and shameful. After his partial acquittal he wrote (Vol. 3, p. 77) of the embarrassment which the trial had caused him, that it had diverted his success, and that he did not like such alien things around his art. He was so deeply disgusted that his desire was to return to his solitude, to publish nothing and to cause no more talk, so savage was the hypocrisy.

He turned to work on Salambo, with the scene laid in Carthage 300 years before Christ, because as he stated (Vol. 3, p. 118) there was too much talk of Bovary, his next book would be so far from modern manners that there could be no possible resemblance between his heros and the readers.

Nor does modern American history lack for similar examples. Theodore Dreiser's life has been marred by the censorship of some of his works now regarded as American classics. His "An American Tragedy" was judicially censored and suppressed as obscene in Massachusetts (*Commonwealth* v. *Friede,* 271 Mass. 318; 171 N. E. 472 (1930). About 1918 the John Lane Company which had published "The Genius" was warned by the Society for the Suppression of Vice that the book was obscene. The company decided to cease the sale of the novel. Dreiser recalled the fate of his first book "Sister Carrie" which Doubleday had accepted and then feared to publish. Dreiser insisted that the contract be carried out and Doubleday, after consulting counsel, continued the publication. Some 1,000 copies were printed but somehow never saw the light of day, thus making his first published novel a failure. Dreiser lacked money but a New York

law firm volunteered its services and brought suit against John Lane Company on an agreed statement of fact that if the book be found obscene, Dreiser should not recover. (See *Alpert's* article, *supra,* at p. 58.)

As the opinion in that case states (*Dreiser* v. *Lane Co.,* 183 App. Div. 773, 775 (1918)) both the author and publisher desired an expression by the Court of its opinion as to whether the book violated the New York law against obscene literature. But the Court neatly avoided the question on the ground that the function of the Court was not to give advisory opinions. Thus was an eminent author stultified, harried and severely damaged by the mere threat of subsequent punishment by a private self-appointed censorship society.

Thus, it is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to this freedom (*Thornhill* v. *Alabama, supra,* at pp. 97, 98).

There was and is no way open to a publisher or author to submit ideas, manuscript or book to a court or other civil authority, before publication, for an ascertainment of whether it is obscene or immoral or unconstitutional, and even if there were, that might result in a censorship prior to publication, which the First Amendment was designed to prevent. They must await a publication and sale, by which time the labor of writing the book and the cost of publishing it have been expended. Even a successful defense of a criminal prosecution causes hardship and loss. Moreover, the ban is likely to fall not only at a crucial time but upon the most important subjects then under discussion (*Bridges* v. *California, supra,* at p. 268).

The remarks of Alpert in his article, *supra,* at page 75, are well worth repeating:

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"Literature is a social function, and its values, first and last, social values. • • •

"Now ultimate ends and ultimate values are beyond man's perspective. • • •

"Literature, therefore, should not be asked to embody the values of the time. Literature should disseminate ideas, not moralities. If the author's ideas jar the prevailing mores, it is not the ideas which must be suppressed: both can exist cotaneously, and both must so exist if society is not to stagnate, decay, and die. Moralities change; ideas develop; and the change in morals springs from the development of ideas. • • •

"To say that a substantial amount of the normal person's time is occupied with sex is neither to admit a brooding over original sin nor to bellow with Freudian fury about man and woman. It is the statement of an actuality. If, therefore, literature is to be 'pudibund', to be closely restrained in the enunciation of sex ideas, one of the social functions of literature will be vitiated to society's loss."

The greatest menace to freedom is an inert people; it is hazardous to discourage thought and imagination; silence coerced by law is to be eschewed. (*Whitney* v. *California,* 274 U. S. 357, 372, Brandeis, J.)

The infallibility of the judgments of men of law in this field has been questioned (*Halsey* v. *New York Society,* 234 N. Y. 1, 6; *People* v. *Gitter,* 133 Misc. 693, 694). The decisions in New York indicate a reason for that and prove that the fate of the literary artist and his publisher and book should not be left to depend upon the "tender mercies" of private self-appointed censors and guardians of the public morals or even upon the vagaries of judges.

The ultimate good desired is best reached by free trade in ideas (*Abrams* v. *U. S.,* 250 U. S. 616, 630 (1919)

Holmes, J., dissenting). "A book merely obscene soon dies" (*Halsey* case, *supra*, p. 6). A book that does not survive the "competition of the market" cannot live. History shows that society in general is a better judge of literature than private censorship societies or even courts.

In *Hannegan* v. *Esquire, Inc., supra*, at page 157, this Court, in respect of a magazine which the Postmaster General characterized as indecent, vulgar, risque, immoral, improper and not for the public welfare or good, gave expression to views which might well be pondered in relation to the present problem:

> "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

Today a lawyer who is asked by an author or publisher for an opinion as to whether a projected literary work would be suppressed as obsence cannot honestly answer the question. He is in the position of John Wilkes whose poem "Essay on Woman" was denounced as obscene.

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Thereafter, in Paris, Madame Pompadour inquired of Wilkes: "How far does the liberty of the press extend in England?" His answer was characteristic "I do not know. I am trying to find out." (See Alpert's article *supra*, at p. 44.)

Here the appellant and every other publisher and author are trying to find out how far the liberty of the press extends in the United States. The inquiry is pertinent and vitally important, not only to authors and publishers and to the reading public, but to society at large. The signposts to "criminality" and to "permissible free expression" are very blurred and difficult to distinguish.

The clear and present danger rule may not be infallible or the last word on the subject, but it has proved to be a good practical working rule and in its application by this Court has brought order out of chaos in many fields where State acts and laws have impinged on the federally guaranteed civil liberties. It can bring order in the very confused field of judicially censored "obscene" literature.

Some conclusions of present application can be drawn from the famous cases of judicial literary censorship.

1. No standards are now ascertainable, either as to the "evil" aimed at or the tests of guilt. No one may know when his book may by some censor be considered "against good morals" or "obscene". No law has ever set a standard so that an author may be said to knowingly violate it. The standards are purely personal. And they vary widely between individuals and from day to day with the same individual.

2. The whole subject impinges upon common concepts of free speech—that a literary book openly published and sold and with the author's and publisher's names stated has a right to a hearing before the public.

3. The censors generally apply their condemnation to newly published works. There is some peculiar feeling that books already published may be openly sold without harming morals. "Madame Bovary", for instance, in English translation can be sold without danger. But were it published for the first time today, it would have to run the gauntlet to survive. There is this strange feeling that public morals are harmfully affected only by books and by recently published books. The unascertainable standards are eccentrically applied.

4. The loss to society, as indicated by the example of "Madame Bovary" is not only in regard to the book involved, but in preventing the next book being written.

Conclusion

Here, for the first time, is presented to this Court an opportunity to determine the limits of free expression, under the Constitution, in relation to State obscenity statutes in the great and important field of literature. Decisions in the State courts have created vast uncertainty and confusion and have ignored the Constitutional principles and tests. The fate of this book is important, but more important is the fate of future literature and the principles that hereafter will set the pattern in this class of case.

We believe and respectfully submit that the decision below should be reversed with a clarifying and authoritative statement of the applicable constitutional principles and tests.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

KENNETH W. GREENAWALT,
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